



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

ment. Had the latter been left entirely out of consideration, it is possible that a decision following the contrary English rule¹¹ might have resulted. Based chiefly on an early English *nisi prius* decision,¹² allowing the admission of an insurance payment in mitigation of damages, the Texas case of *San Antonio and Aransas Pass Railway Company v. Long*¹³ stands practically alone as an American exponent of the English view. However, the passage of the act of Parliament¹⁴ excluding evidence of insurance payments in mitigation of damages, the refusal of the Texas courts¹⁵ to follow the Long case, the removal in many states of the restrictions as to maximum amounts to be recovered in such actions,¹⁶ and the overwhelming weight of authority in the American courts in favor of the exclusion of such evidence,¹⁷ all tend to show that both on principle and authority the decision in the principal case was just and proper.

G. H. G.

MORTGAGES: RIGHT TO WAIVE THE PROVISION OF SECTION 726 OF THE CODE OF CIVIL PROCEDURE.—Section 726 of the Code of Civil Procedure provides that there can be but one action on a debt or obligation secured by mortgage, which action must be brought as provided in the code.¹ Under this section it is held that the security cannot be waived and action be brought on the note, since the debtor is not personally liable until the security is exhausted.² Waiver of a part of the security or loss of the right to go against it by reason of the negligence of the mortgagee

35. ¹¹ *Blake v. Midland Ry. Co.* (1852), 18 Q. B. 93, 118 Eng. Repr.

¹² *Hicks v. Newport, A. & H. Ry. Co.* (1857), 4 B. & S. 397, note, 122 Eng. Repr. 508, 510.

¹³ (1894), 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637. See *Demarest v. Little* (1885), 47 N. J. L. 28.

¹⁴ Fatal Accidents (Damages) Act, 8 Edw. 7, c. 7, [1908] Stat. 8.

¹⁵ *Tyler Southeastern Ry. Co. v. Rasberry* (1896), 13 Tex. Civ. App. 185, 34 S. W. 794; *Gulf C. & S. F. Ry. v. Younger* (1897), 90 Tex. 387, 38 S. W. 1121; *Houston & T. C. Ry. Co. v. Lemair* (1909), 55 Tex. Civ. App. 237, 119 S. W. 1162.

¹⁶ Const. Penn. art. ii. § 21, in effect Jan. 1, 1874; Const. New York, art. ii, § 18, in effect Jan. 1, 1895. See 3 *Shearman & Redfield on Negligence* 6th ed., 2049, § 776.

¹⁷ *Illinois Central R. R. Co. v. Barron* (1866), 5 Wall. (72 U. S.) 90; (insurance) *N. Penn. R. R. Co. v. Kirk* (1879), 90 Pa. St. 15; (pensions) *Geary v. Metropolitan St. Ry. Co.* (1902), 73 App. Div. 441, 77 N. Y. Supp. 54; *St. Louis I. M. & S. Ry. v. Maddry* (1893), 57 Ark. 306, 21 S. W. 472; (re-marriage of plaintiff) *Wabash Ry. v. Gretzinger* (Ind., 1914), 104 N. E. 69; *Chicago & E. I. Ry. Co. v. Driscoll* (1903), 207 Ill. 9, 69 N. E. 620. See also note 67 L. R. A. 87, 91.

¹ The section is based on § 246 of the Practice Act, as amended in 1865.

² *Biddel v. Brizzolara* (1883), 64 Cal. 354, 30 Pac. 609. But the section does not apply to debts secured by pledge, *Ehrlich v. Ewald* (1884), 66 Cal. 97, 4 Pac. 1062; *Jones v. Evans* (1907), 6 Cal. App. 88, 91 Pac. 532.

destroys the right to a deficiency judgment,³ and release of portions of the security without the consent of the debtor releases him from liability to the extent to which the deficiency is increased.⁴ No counterclaim, set-off or lien may be asserted on a debt secured by mortgage.⁵ If an action is brought on the debt in another state the right to foreclose on the security in California is lost.⁶ But the section is in derogation of the freedom of contract and is not to be extended beyond the obvious import of its terms.⁷ Therefore an action may be maintained in California for a deficiency where the mortgage was foreclosed in another state, since a personal judgment for the deficiency could not be given in that suit if the debtor was without the jurisdiction.⁸ If the debtor has no title to the mortgaged property, action may be brought on the debt without going through the empty formality of foreclosure,⁹ but if the mortgage on its face was "security" for the debt, and the debtor has a right to encumber it there must be foreclosure regardless of the value of the property, even though prior mortgages amount to more than the market value of the property.¹⁰ The parties may stipulate for sale of the premises in specified lots,¹¹ and part of the security may be waived so long as a deficiency judgment is not sought.¹² Nor need there be foreclosure to hold persons collaterally liable on the debt, as indorsers of the mortgage note.¹³ Attention was called in a recent issue of this Review to the fact that an action of unlawful detainer or other auxiliary remedy to secure possession of the property, where allowed by law or by the contract of the parties, is not the "one action" allowed by the code, and is no bar to foreclosure.¹⁴ In

³ *Hibernia Sav. & Loan Soc. v. Thornton* (1895), 109 Cal. 427, 42 Pac. 447, 50 Am. St. Rep. 52. But if the lien is lost without the fault of the mortgagee he can bring action on the debt, *Savings Bank v. Central Market Co.* (1898), 122 Cal. 28, 54 Pac. 273.

⁴ *Woodward v. Brown* (1897), 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

⁵ *McKean v. German-American Sav. Bank* (1897), 118 Cal. 334, 50 Pac. 656.

⁶ *Ould v. Stoddard* (1880), 54 Cal. 613.

⁷ *Merced Bank v. Casaccia* (1894), 103 Cal. 641, 37 Pac. 648.

⁸ *Felton v. West* (1894), 102 Cal. 266, 36 Pac. 676. See also *Blumberg v. Birch* (1893), 99 Cal. 416, 34 Pac. 102, 37 Am. St. Rep. 67, where an action on the deficiency was allowed against a mortgagor who was a non-resident at the time of foreclosure and consequently was not personally bound by service by publication, although the foreclosure suit was in this state.

⁹ *Otto v. Long* (1900), 127 Cal. 471, 59 Pac. 895.

¹⁰ *Barbieri v. Ramelli* (1890), 84 Cal. 154, 23 Pac. 1086.

¹¹ *Humboldt Sav. Bank v. McCleverty* (1911), 161 Cal. 285, 119 Pac. 82; *Bank of Sonoma Co. v. Charles* (1890), 86 Cal. 322, 24 Pac. 1019.

¹² *Bull v. Coe* (1888), 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

¹³ *Carver v. Steele* (1897), 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156; *Kinsel v. Ballou* (1907), 151 Cal. 754, 91 Pac. 620; *Vandewater v. McRae* (1865), 27 Cal. 596.

¹⁴ 3 Cal. Law Rev. 173. See also *Ashcroft Estate Co. v. Nelson*

*Careaga v. Becker*¹⁵ this doctrine was extended to permit foreclosure of mechanic's liens though the claims were among those secured by a mortgage given by the contractor to the material-man. In *Post v. Becker*¹⁶ it was held that the mortgage could be foreclosed so long as the claims on which lien actions were pending were not included in the foreclosure.

The later cases seem to manifest a more liberal view than was shown in the earlier decisions construing the statute. Indeed in the *Careaga* case it was said that the section was inapplicable except in an action involving the debt directly secured by the mortgage, and furthermore that it existed merely for the protection of the principal debtor and could be waived by him. It seems to have been tacitly assumed by the profession that this section, like the equity of redemption, was founded on public policy and could not be waived by the parties. None of the mortgage forms in general use appear to contain such a waiver, though otherwise very favorable to the mortgagee. The cases that have discussed the matter heretofore have merely said that the section was passed to relieve the principal debtor from the harassment of numerous actions when one would be sufficient, and to make the mortgaged property the fund primarily liable for the debt.¹⁷ It would appear then that the section merely states a method to be followed in the absence of agreement to the contrary. Indeed, its provisions may to some extent be avoided by use of the trust deed, or mortgage with power of sale, forms of security. It does not seem to be founded any deeper in public policy than the statute of limitations, homestead or execution exemptions, all of which may be waived, at least in part, or by complying with certain formalities. The effect of the dictum in the principal case will probably be to cause the addition of a waiver of section 726 to many mortgages hereafter drawn in this state.

J. S. M., Jr.

WATER LAW: IRRIGATION DISTRICTS: RIGHTS OF PROSPECTIVE CONSUMERS.—The increasing importance of irrigation and the creation of numerous large and important enterprises for the purpose of distributing water to the public have given rise to a multiplicity of novel questions involving the respective rights of the water users as between themselves and also with

(Jan. 25, 1915), 20 Cal. App. Dec. 146. Rehearing denied by Supreme Court March 26, 1915.

¹⁵ (Feb. 11, 1915), 49 Cal. Dec. 142, 146 Pac. 665.

¹⁶ (Jan. 23, 1915), 20 Cal. App. Dec. 142, 147 Pac. 98.

¹⁷ *Ould v. Stoddard*, supra, n. 6; *Toby v. Oregon Pac. R. R. Co.* (1893), 98 Cal. 490, 33 Pac. 550; *Commercial Bank v. Kershner* (1898), 120 Cal. 495, 52 Pac. 848; *Hellyer v. Baldwin* (1890), 53 N. J. L. 141, 20 Atl. 1080; *Winters v. Hub Min. Co.* (1893), 57 Fed. 287.